



**STATE OF HAWAII**  
**DEPARTMENT OF TAXATION**  
830 PUNCHBOWL STREET, ROOM 221  
HONOLULU, HAWAII 96813  
<http://tax.hawaii.gov/>  
Phone: (808) 587-1530 / Fax: (808) 587-1584  
Email: Tax.Rules.Office@hawaii.gov

June 27, 2018

## **DEPARTMENT OF TAXATION ANNOUNCEMENT NO. 2018-10**

Re: Implementation of Act 41, Session Laws of Hawaii 2018, Relating to When a Taxpayer is Engaging in Business in the State for Purposes of Hawaii's General Excise Tax

### **Background**

The general excise tax (GET) is a privilege tax imposed on all business and other activities "in the State." Haw. Rev. Stat § 237-13. Although it is clear that a business with a physical presence in Hawaii satisfies the statutory "in the State" requirement and is therefore subject to GET, the law was previously unclear as to the circumstances under which a business that lacks a physical presence in Hawaii would satisfy the "in the State" requirement. See Travelocity.com, L.P. v. Director of Taxation, 135 Hawaii 88, 103 (2015) (rejecting argument that taxpayers must have physical presence in the State to satisfy the statutory "in the State" requirement).

Act 41, Session Laws of Hawaii 2018 (Act 41) clarifies the "in the State" requirement by creating a bright-line rule for businesses that lack a physical presence in Hawaii. Specifically, Act 41 provides that a person is engaging in business in the State, regardless of whether the person is physically present in the State, if in the current or preceding calendar year:

- (1) The person has gross income of \$100,000 or more from the sale of tangible personal property delivered in the State, services used or consumed in the State, or intangible property used in the State; or
- (2) The person has entered into 200 or more separate transactions involving tangible personal property delivered in the State, services used or consumed in the State, or intangible property used in the State.

Somewhat overlapping with the statutory "in the State" requirement is the requirement imposed by the U.S. Commerce Clause that a taxpayer's activity must have a substantial nexus with the taxing jurisdiction. See Baker & Taylor, Inc. v. Kawafuchi, 103 Hawaii 359, 365-71 (2004) (analyzing whether taxpayer was engaged in business "in the State" and whether

taxpayer's activity had a substantial nexus with the State); see also Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977) (articulating substantial nexus requirement).

In South Dakota v. Wayfair, Inc., No. 17-494, 2018 WL 3058015, at \*17 (U.S. Jun. 21, 2018), the U.S. Supreme Court held that South Dakota's statute, which has a similar \$100,000 or 200-transaction threshold, satisfies the substantial nexus requirement imposed by the U.S. Commerce Clause, as "[t]his quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in [the state]."

In sum, the imposition of the GET on a taxpayer who lacks physical presence in Hawaii, but who has gross income of \$100,000 or more or who has entered into 200 or more transactions attributable to Hawaii, comports with the statutory "in the State" requirement as well as the U.S. Commerce Clause's substantial nexus requirement.

A taxpayer will therefore be required to maintain a GET license, file GET returns, and remit GET to the State if *any* of the following applies:

- (1) Taxpayer has a **physical presence**<sup>1</sup> in Hawaii;
- (2) In the current or preceding calendar year, taxpayer has **gross income or gross proceeds of \$100,000 or more** from any of the following, or combination of the following, activities:
  - a. Tangible property delivered in Hawaii;
  - b. Services used or consumed in Hawaii<sup>2</sup>; or
  - c. Intangible property used in Hawaii; or
- (3) In the current or preceding calendar year, taxpayer has entered into **200 or more separate transactions** involving any of the following, or combination of the following, activities:
  - a. Tangible property delivered in Hawaii;
  - b. Services used or consumed in Hawaii; or
  - c. Intangible property used in Hawaii.

---

<sup>1</sup> Physical presence includes, but is not limited to, having an office, employees or representatives, inventory, or other property in Hawaii, or providing services in Hawaii, such as installation, training, maintenance, or repair services.

<sup>2</sup> See sections 18-237-29.53-01 through 18-237-29.53-13, Hawaii Administrative Rules, and Tax Information Release No. 2018-06 for more information regarding the sourcing of income from services.

### **Implementation of Act 41**

Act 41 is effective on July 1, 2018, but applies to taxable years beginning after December 31, 2017. Accordingly, if a taxpayer meets the \$100,000 or 200-transaction threshold in calendar year 2017 or calendar year 2018, the taxpayer will be subject to GET for the tax year beginning after December 31, 2017. As a result, certain taxpayers may not have filed periodic returns between January 2018 and June 2018, but owe GET for part or all of that time period.

The Department will allow “qualifying taxpayers,” as defined below, to report and pay GET on “catchup income” (income recognized before July 1, 2018 for the tax year beginning between January 1, 2018 and June 30, 2018), without penalty or interest, as follows:

- (1) Qualifying taxpayers may report and pay GET on all catchup income in full on their next periodic return due after July 20, 2018; or
- (2) Qualifying taxpayers may report and pay GET on catchup income by spreading the liability over the remaining periods in the current tax year, beginning with the next periodic return due after July 20, 2018.

A “qualifying taxpayer” is a taxpayer who:

- (1) Did not have a GET license as of June 12, 2018<sup>3</sup>;
- (2) Lacks physical presence in Hawaii as of June 12, 2018;
- (3) Meets the \$100,000 or 200-transaction threshold for 2017 or 2018; *and*
- (4) Has a tax year beginning between January 1, 2018 and June 30, 2018;

### **FAQs**

#### **Engaging in Business in the State**

- 1. I have a physical presence in Hawaii, but I have less than \$100,000 in gross income and have entered into less than 200 transactions. Do I have to pay GET?**

Yes, because you have a physical presence in Hawaii, you are engaging in business in the State and are subject to GET even if you do not meet the \$100,000 or 200-transaction threshold.

---

<sup>3</sup> Act 41 was signed into law on June 12, 2018.

**2. I do not have a physical presence in Hawaii, but I have \$100,000 in gross income attributable to Hawaii in 2018. Do I have to pay GET?**

Yes, you are required to obtain a GET license immediately and begin paying GET by the next applicable filing deadline. You are engaging in business in the State because you met the \$100,000 threshold in the current calendar year.

**3. I do not have a physical presence in Hawaii. My gross income attributable to Hawaii was \$100,000 in 2017 and \$50,000 in 2018. Do I have to pay GET?**

Yes, you are required to obtain a GET license immediately and begin paying GET by the next applicable filing deadline. You are engaging in business in the State if you meet the \$100,000 or 200-transaction threshold in the *current or preceding* calendar year.

**4. I do not have a physical presence in Hawaii, but in 2017, I entered into 100 transactions for tangible property delivered in Hawaii and 100 transactions for intangible property used in Hawaii. Do I have to pay GET?**

Yes, you are required to obtain a GET license immediately and begin paying GET by the next applicable filing deadline. You are engaging in business in the State if you have entered into 200 transactions for *any combination of* tangible property delivered in the State, services used or consumed in the State, or intangible property used in the State.

**5. I do not have a physical presence in Hawaii. If I entered into 200 transactions attributable to Hawaii in 2018, but have less than \$100,000 in gross income, do I have to pay GET?**

Yes, you are required to obtain a GET license immediately and begin paying GET by the next applicable filing deadline. You are engaging in business in the State if you have entered into 200 transactions *or* have \$100,000 of gross income.

**Filing and Payment Deadlines**

**6. I do not have a GET license and do not have a physical presence in Hawaii, but I am engaging in business in Hawaii pursuant to Act 41. When is the deadline to file my first GET return?**

Periodic returns are due on the 20<sup>th</sup> day following the close of the filing period. Your filing period is monthly if you will pay more than \$4,000 in GET for the year; quarterly if you will pay more than \$2,000, but \$4,000 or less in GET for the year; or semiannually if you will pay \$2,000 or less in GET for the year. Annual returns are due on the 20<sup>th</sup> day of the fourth month following the close of the tax year.

Qualifying taxpayers, as defined on page 3 of this Announcement, must file a periodic return by the next deadline after July 20, 2018. If you are a calendar year taxpayer and will be

filing on a monthly basis, your first return is due on August 20, 2018; if you are a calendar year taxpayer and will be filing on a quarterly basis, your first return is due October 20, 2018; if you are a calendar year taxpayer and will be filing on a semiannual basis, your first return is due on January 20, 2019.

**7. I am a “qualifying taxpayer.” I owe \$6,000 in GET for catchup income and will be filing on a monthly basis. How do I report and pay GET on the catchup income?**

You may either: (1) report and pay the \$6,000 on August 20, 2018, your next monthly return, or (2) report and pay the \$6,000 in equal installments over the remaining periods in the current tax year.

If you elect to pay the \$6,000 in installments and are a calendar year taxpayer, you should divide the \$6,000 over the six remaining monthly periods. For example, if you owe \$6,000 in GET for January 2018 to June 2018 and \$500 in GET for July 2018, you should report and pay \$1,500 in GET on August 20, 2018 (\$1,000 installment for catchup income plus \$500 liability for the month of July). You should continue to pay \$1,000 in GET for the catchup income on each monthly return until the end of the tax year.

**8. I am a “qualifying taxpayer.” I owe \$1,000 in GET for catchup income and will be filing on a quarterly basis. How do I report and pay GET on the catchup income?**

You may either: (1) report and pay the \$1,000 on October 20, 2018, your next quarterly return, or (2) report and pay the \$1,000 in equal installments over the remaining periods in the current tax year.

If you elect to pay the \$1,000 in installments and are a calendar year taxpayer, you should divide the \$1,000 over the two remaining quarterly periods. For example, if you owe \$1,000 in GET for January 2018 to June 2018 and \$400 in GET for July 2018 to September 2018, you should report and pay \$900 in GET on October 20, 2018 (\$500 installment for catchup income plus \$400 liability for the quarter ending in September). You should also add \$500 in GET for the catchup income on your quarterly returns due on December 20, 2018.

**9. I am a “qualifying taxpayer.” I owe \$500 in GET for catchup income and will be filing on a semiannual basis. How do I report and pay GET on the catchup income?**

Because there is only one semiannual period left in the current tax year, you must report and pay the \$500 in GET for catchup income by January 20, 2019, the deadline of your next semiannual return. For example, if you owe \$500 in GET for January 2018 to June 2018 and \$600 in GET for July 2018 to December 2018, you should report and pay \$1,100 in GET on January 20, 2019 (\$500 for catchup income plus \$600 liability for the semiannual period ending in December).

**10. I do not meet one all of the requirements under the definition of “qualifying taxpayer.” Can I pay GET on my catchup income in installments pursuant to this Tax Announcement without penalty?**

No, because you are not a qualifying taxpayer, you are not eligible to pay catchup income in installments pursuant to this Tax Announcement. If you have outstanding tax liabilities, you may apply for voluntary disclosure. See Tax Information Release No. 2016-02 for more information.

For additional information regarding Act 41, contact the Rules Office at (808) 587-1530 or by email at [Tax.Rules.Office@hawaii.gov](mailto:Tax.Rules.Office@hawaii.gov). For general information regarding Hawaii’s GET, and to obtain tax forms, instructions, and publications, visit the Department’s website at [tax.hawaii.gov](http://tax.hawaii.gov).

LINDA CHU TAKAYAMA  
Director of Taxation